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DAY OF GENERAL DISCUSSION: RIGHT TO EDUCATION
(ARTICLES 13 AND 14 OF THE COVENANT)

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Background paper submitted by Ms. Katarina Tomasevski,
Special Rapporteur on the right to education of the
Commission on Human Rights

1. The right to education has been marked by retrogression rather than progressive realization, as required by the International Covenant on Economic, Social and Cultural Rights. A human rights response thus has to encompass the objective of halting retrogression in the countries where it has taken place as well as furthering progressive realization in others. This necessitates human rights analysis to encompass areas and issues which pose a conceptual challenge. In this text I will discuss the need to design a human rights strategy adapted to the process of resource allocation at the macro-level, suitable for influencing investment in education as well as distribution within the sector of education. Differences between the sector of education and the right to education require a great deal of thought because the vocabulary and underlying concepts differ a great deal. This reveals the need to adjust the sector of education to human rights requirements.

Resource allocation

2. International macroeconomic policy documents of the 1990s rarely use human rights language. A term such as "social safety net" has replaced social rights, "access to education" is used instead of the right to education, or "basic education" rather than primary education. An analysis of conceptual differences and their effects on the realization of human rights is clearly necessary.

3. The introduction of school fees in primary education has led to diminished school enrolment and requires a forceful human rights response. If access to education is defined as self-provisioning, there is a risk that it will become a correlate of purchasing power. The income of the child's parents and/or family becomes the factor determining whether a child has access to school. Similar to the proverbial focus in the human rights analysis on the ability and willingness of States as the determinant of their human rights performance, an analysis is now required on the micro-level. Much as at the macro-level, the diminished ability of families to invest in the education of their children cannot but have negative effects.

4. International human rights law does not contain an enforceable guarantee of "right to income" or at least "freedom from poverty". Basic needs of those unable to pay for the necessary services cannot translate into an effective demand if the "currency" is not human need or right, but money. Access to services becomes a correlate of income distribution, nationally and internationally, and thus contradicts one of the main features - and important accomplishments - of human rights. Human rights advocacy therefore has to target governmental obligations relating to human rights as whole, the obligation to act and to react, to pursue specific conduct or to achieve a particular result. A departure from an exclusive focus on individual rights to individual duties towards each other is also necessary - how can the disadvantaged have any rights if the privileged have no duties? A focus on individual rights ought to be complemented by a corollary attention to individual duties. The right to education necessitates an inquiry into parental duties towards their children as well as individual duties towards the community. The focus in development studies and policies has been on poverty; there is a paucity of studies and policies concerning wealth. International human rights law has had little to say about taxation although it is a key method for generating governmental revenue; such revenue has to be generated before it can be allocated for any purpose.

5. The rationale behind this silence in the international human rights law was the perceived ability of Governments to enforce individual duties and obligations - especially taxation - and so human rights safeguards were necessary to affirm individual rights and freedoms. The ability of Governments to impose and enforce "the tax burden" (as it is commonly called today) has been substantially eroded. At the international level, the effects have been reflected in diminished flows of international development aid, at the domestic level in the exploration of other ways to mobilize private funds for public services, including education. These range between decentralization and privatization. Accumulation and distribution of resources at the level of the local community and a shift from public finance to fee-for-service ....

6. At a high level of abstraction, this crucial contemporary dilemma - how to generate necessary financial resources? - translates into the societal and political acceptance - or the lack thereof - of governmental powers to raise revenue through taxation. At a lower level of abstraction, it creates challenges in designing models for the realization of the right to education as well as for human rights education. How can an acquired right to free education for university students be reconciled with depriving children of access to any education whatsoever? How does one ensure that a culture of

acquired rights is not reinforced through human rights education that only emphasizes one's own rights and is silent about duties towards others? Is there a way out of this proverbial trap of zero-sum-game that pits beneficiaries of diminished public funding for education against each other?

7. The raison d'être of economic and social rights is to act as correctives to the free market. Governments have human rights obligations because primary education should not be treated as a commodity. The prohibition of slavery exempted people from being sold and purchased against a price. The International Labour Organization (ILO) added that labour should not be treated as a commodity. International human rights law thereafter started removing price tags from the necessities for survival and development. It prioritizes the rights of the child so as to correct both free-market mechanisms and political processes in favour of children. Despite controversies relating to governmental obligations corresponding to economic, social and cultural rights, the core obligations are clear: Governments have a general obligation to enable people to provide for themselves and exceptionally to provide for those unable to do so. Rights of the child are thus prioritized over rights of adults.

8. Economic and social rights entail governmental obligations to create conditions for their realization, an enabling environment. The absence of an enforceable claim upon a Government to allocate a specific amount to education highlights the need to focus on the procedure whereby allocations are decided upon. Human rights are seldom costed because human rights standards do not determine how much should be spent on specific items, but define instead the process of decision-making. The exercise of political rights thus becomes the necessary instrument for attaining economic and social rights.

9. Governmental obligations cut across specific individual rights, as is well known from principles of indivisibility and interrelatedness. Poverty cannot be easily divided to conform to education, food, health, housing, and other explicitly recognized rights. Moreover, it is not immediately apparent when and where poverty is an obstacle to the realization of human rights (and thus States, communities, families and individuals should be assisted so as to be able to overcome it), as opposed to poverty resulting from abuse of power which should be addressed as a human rights violation. Distinguishing between governmental inability to implement its human rights obligations and its unwillingness to do so is crucial. Attempts to enforce human rights obligations are absurd in the case of inability because nobody can be forced by law to perform the impossible. Unwillingness requires an inquiry into macroeconomic, monetary and fiscal policies from which human rights dimensions are routinely excluded, but which often have a negative impact on governmental human rights obligations as a whole.

10. Since governmental obligations emanating from economic and social rights revolve around allocation of resources, they remain beyond the reach of complaint procedures which give standing to the individual victims. Judicial bodies cannot take over issues traditionally allocated to the legislature. A procedural approach can become an effective method of challenging disregard of human rights in macroeconomic policies through a requirement that a human rights impact assessment be carried out before such policies are developed and implemented.

The sector of education and the right to education

11. Because human rights treaties make the provision of primary education free of charge an obligation for Governments, denial of access to primary school because parents cannot pay school fees is difficult to reconcile with the child's right to education. Human rights norms do not preclude cost-sharing, but making access of the child to school conditional upon the parents' ability to pay is apparently incompatible with human rights requirements. An authoritative determination of what specifically constitutes a human rights violation is awaited, however.

12. The problem of direct cost for parents reaches beyond school fees or differently named "contributions" to purchasing school materials, uniforms, or paying for transport. There is no such thing as "free" education, of course. The building and maintenance of schools, teachers' salaries, school books, uniforms, meals, transportation necessitate considerable investment. The Convention on the Rights of the Child postulates that parents are primarily responsible for providing for their children. Cost-sharing in some form exists in most countries; even if education is free for both parents and children, parents will be contributing to the cost through taxation. The recognition of the rights of the child requires the Government to step in if parents cannot educate their children (poverty) or would not do so (discrimination against girls). The role of the Government is to facilitate and supplement - but also to correct - efforts of parents and communities. This dual role of the Government is crucial because it covers both financing and improving equal access, which are interrelated.

13. Dual school systems, public and private, enable parents who are able to afford private education for their children to do so. It is often noted that "highly differentiated provision of schooling correlated with incomes of the parents of the pupils. It generates a system of bad schools for the poor majority, and good schools for the rich." 1/

14. The rationale for prioritizing investment in education does not necessarily follow human rights requirements, however. A definition of education as "efficient production of human capital" may well be cited as an argument for such investment but excludes the concept of education embodied in human rights law and classifies it in "externalities". The increasing change of terminology from primary to basic education might imply the lowering of the child's right to education, both quantitatively and qualitatively. As is well known, the effects of such innovations are likely to be discriminatory unless specific policies are in place to prevent this.

15. In assessing the extent to which the sector of education corresponds to the applicable human rights norms one should focus, first and foremost, on the key principle of non-discrimination. Low educational enrolment is one manifestation of gender discrimination which is increasingly documented.

1/ C. Colclough et al. Education in Zimbabwe. Issues of Quantity and Quality, Education Division Documents, No. 50, Swedish International Development Agency, Stockholm, December 1990, p. 12.

This knowledge necessitates a comprehensive strategy because constitutional and legislative framework for human rights may not guide educational policy. The prohibition of racial discrimination or the recognition of minority or indigenous languages may not be transposed into the sector of education and remain invisible because statistical categories developed for the sector of education do not capture them. As long as documentation in the sector of education is generated without an eye to identifying discriminatory patterns, they may well be reinforced but remain invisible.